IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERTO VARGAS GARCIA, Appellant, v. PEOPLE OF THE STATE OF CALIFORNIA, et al., Appellees.	No. 21893

APPELLEE'S BRIEF

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JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for writ of habeas corpus was invoked under Title 28, United States Code section 1915. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes an order in a habeas corpus proceeding reviewable in the Court of Appeals when, as here, a certificate of probable cause has been issued.

STATEMENT OF THE CASE

Appellant appeals from the order of the United States District Court for the Northern District of California, denying his petition for writ of habeas corpus.

A. Proceedings in the state courts.

On December 11, 1958, appellant was convicted of violating California Health and Safety Code section 11500 (possession of a narcotic). He was sentenced to be imprisoned for the term prescribed by law. There was no appeal. A copy of this judgment and commitment is marked "Exhibit A," attached hereto and made a part hereof.

Thereafter, on January 30, 1963, appellant was again convicted of violating California Health and Safety Code section 11500. Two alleged prior convictions for the same offense were found to be true. Appellant was sentenced to be imprisoned for the term prescribed by law. A copy of this judgment and commitment is marked "Exhibit B," attached hereto and made a part hereof. This conviction was affirmed on appeal by the Court of Appeal, Second Appellate District. The California Supreme Court denied appellant's petition for a hearing. See People v. Garcia, 227 Cal.App.2d 345, 353, 38 Cal. Rptr. 670, 674 (1964). Subsequently, the California Supreme Court denied without opinion appellant's petition for writ of habeas corpus (TR 43; AOB 3).[1/]

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1. "TR" refers to the transcript of record on the proceedings in the District Court.

B. Proceedings in the federal courts.

On December 14, 1964, the Supreme Court of the United States denied appellant's petition for writ of certiorari. Garcia v. California, 379 U.S. 949, 85 S.Ct. 446, 13 L.Ed.2d 546 (1964).

On August 6, 1965, the United States District Court for the Northern District of California denied appellant's petition for writ of habeas corpus for failure to exhaust state remedies (TR 5-6).

After having unsuccessfully applied for relief in the California Supreme Court, appellant again petitioned for habeas corpus in the United States District Court for the Northern District of California on December 30, 1965 (TR 2-10).

On February 14, 1966, the District Court issued an order to show cause (TR 7, 220; AOB 3). The petition was denied on July 6, 1966 (TR 78-79; AOB 3). On August 26, 1966, the Court granted a rehearing and directed respondent to make a supplemental return (TR 87; AOB 3-4). On November 26, 1966, the Court issued an order vacating the previous denial of the writ and a supplemental order to show cause (TR 97; AOB 4). On March 14, 1967, the Honorable Alfonso J. Zirpoli denied the petition, concluding that appellant was barred by McNally v. Hill, 293 U.S. 131, 55 S.Ct. 24, 79 L.Ed. 238 (1934), and did not come within the exception to the McNally

doctrine established in Ex parte Hull, 312 U.S. 546, 61 S.Ct. 640, 85 L.Ed. 1034 (1941) (TR 203-206; AOB 4).

On April 27, 1967, appellant filed notice of appeal (TR 218; AOB 4). On that date Judge Zirpoli granted appellant's Application for a Certificate of Probable Cause and application for leave to proceed in forma pauperis (TR 207-213; AOB 4). In accordance with petitioner's request, the Certificate of Probable Cause was expressly limited to the question of whether the McNally doctrine properly applies to appellant's case (TR 209, 216).

SUMMARY OF APPELLEE'S ARGUMENT

The District Court properly denied appellant's petition, correctly concluding that appellant comes within the bar of McNally v. Hill.

ARGUMENT

SINCE APPELLANT IS IN CUSTODY PURSUANT TO A CONVICTION WHICH HE HAS NOT CHALLENGED, THE DISTRICT COURT WAS WITHOUT JURISDICTION TO ENTERTAIN HIS PETITION ATTACKING A SUBSEQUENT CONVICTION.

On December 11, 1958, appellant suffered his second conviction for violating California Health and Safety Code section 11500, possession of narcotics. Exhibit A. Appellant was paroled from prison in May, 1962 (TR 109). The following October, the Adult Authority found that appellant had violated numerous

conditions of his parole (TR 204). The Adult Authority cancelled the parole and refixed appellant's term at the maximum (TR 109).

Prior to his return to prison, appellant was arrested for possession of heroin (TR 204). On January 30, 1963, this charge culminated in appellant's third conviction for violating Health and Safety Code section 11500. Exhibit B. On June 17, 1963, the Adult Authority made this conviction a supplementary ground for parole revocation (TR 205-06).

Appellant challenges only his 1963 conviction. He does not attack the 1958 judgment, under which he remains in custody. The District Court held, therefore, that appellant was foreclosed by the doctrine of McNally v. Hill, 293 U.S. 131, 55 S.Ct. 24, 79 L.Ed. 238 (1934). The District Court found that appellant's parole was not revoked solely (or primarily) because of the 1963 conviction. Thus, appellant was unable to bring himself within the narrow exception to McNally announced in Ex parte Hull, 312 U.S. 546, 61 S.Ct. 640, 85 L.Ed. 1034 (1941). Wilson v. Gray, 345 F.2d 282 (9th Cir. 1965). (TR 203-06).

Appellant does not now quarrel with the conclusion that Ex parte Hull does not apply to his case (TR 209-13; Appellant's Opening Brief). Rather, he asks this Court to discard a rule announced by the Supreme

Court of the United States in McNally v. Hill; the writ of habeas corpus will lie only to secure immediate release from custody.

The precise question presented is this: May the writ issue to challenge an allegedly invalid conviction because that conviction affects the petitioner's eligibility for parole under another judgment not attacked? Legal authorities and relevant policies compel a negative answer.

McNally forbids such an expansion of the scope of the writ. There the Supreme Court refused to permit a federal prisoner to attack a sentence which he had not yet begun to serve although he claimed that vacation of the future sentence would render him eligible for parole under another current and valid judgment.

The Supreme Court adhered to this position in Holiday v. Johnston, 313 U.S. 342, 61 S.Ct. 1015, 85 L.Ed. 1392 (1941), holding that habeas corpus would not be awarded to afford a federal prisoner an opportunity to apply for parole.

In 1948, Congress enacted 28 U.S.C. §2255, which authorized federal prisoners to petition for release or resentencing. The "sole purpose" of this statute was "to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum." Hayman v. United States,

342 U.S. 205, 219, 72 S.Ct. 263, 96 L.Ed. 232 (1952). (Emphasis supplied.) To proceed under section 2255, a prisoner must be "in custody." Crow v. United States, 186 F.2d 704 (9th Cir. 1950). See Parker v. Ellis, 362 U.S. 574, 80 S.Ct. 909, 4 L.Ed.2d 963 (1960). The "custody" requirement established in 28 U.S.C. §2255 is identical with that in 28 U.S.C. §2241. Allen v. United States, 349 F.2d 362 (1st Cir. 1965); United States v. Bradford, 194 F.2d 197 (2d Cir.), cert. denied, 343 U.S. 979, 72 S.Ct. 1079, 96 L.Ed. 1371 (1952).

In Heflin v. United States, 358 U.S. 415, 79 S.Ct. 451, 3 L.Ed.2d 407 (1959), the Court held that a federal prisoner may not, under section 2255, attack a sentence which he is not serving. A majority of the Court specifically reaffirmed McNally. Id. at 421, 79 S.Ct. at 454, 3 L.Ed.2d at 411. (Concurring opinion of Mr. Justice Stewart).

We recognize that in these cases federal prisoners denied relief had alternate routes to the federal courts. See Arketa v. Wilson, 373 F.2d 582, 584 (9th Cir. 1967). It is equally clear, however, that the Supreme Court did not rest its decisions upon this basis.

Another reason militates against such a distinction. By its recent enactment of 28 U.S.C. §2254(d), Congress has evinced a new attitude of deference toward

state courts. Our national legislature has said, in effect, that state courts are satisfactory forums for vindicating federal constitutional rights. Thus, that federal prisoners denied habeas corpus or relief under section 2255 may have another remedy within the federal system is insignificant. There is no reason to treat differently federal and state prisoners.

It has been authoritatively determined that the "in custody" requirements of 28 U.S.C. sections 2241 and 2255 are identical. To distinguish the above-cited decisions from the instant case because a state prisoner has no other access to a federal forum would require a repudiation of the reasoning of those cases.

We have shown that, as recently as 1959, the high court reaffirmed the McNally doctrine. Appellant contends, nevertheless, that McNally has been drained of its vitality by subsequent decisions in Jones v. Cunningham, 371 U.S. 236, 83 S.Ct. 373, 9 L.Ed.2d 285 (1962), and in Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963). We earnestly disagree.

Appellant takes as his text the brief but remarkable opinion of the Fourth Circuit in Martin v. Commonwealth, 349 F.2d 781 (4th Cir. 1965). Martin held that the "in custody" requirement of 28 U.S.C. §2241 was satisfied by an allegation that the petitioner's present right to be considered for parole was barred by

a conviction sought to be vacated, even though the petitioner had not yet begun to serve the sentence imposed upon the challenged conviction.

The Fourth Circuit acknowledged that its decision ignored the rule established by McNally. However, in light of Jones v. Cunningham, and Fay v. Noia, the court concluded that

> "There is reasonable ground for thinking that were the Supreme Court faced with the issue today, it might well reconsider McNally and hold that a denial of eligibility for parole is a 'restraint of liberty' . . . ." 349 F.2d 781, at 784.

Martin completely overlooks the Supreme Court's decisions in Holiday v. Johnston, supra, Hayman v. United States, supra, and Heflin v. United States, supra, and fails to analyze the holdings of Jones and Fay.

Jones held only that the restrictive conditions incident to a petitioner's parole status satisfied the "in custody" requirement of section 2241, so as to confer habeas corpus jurisdiction upon a District Court. This holding does not contravene the McNally doctrine.

Fay, far from suggesting the demise of McNally, reaffirms it. There the court stated that "custody in the sense of restraint of liberty is a prerequisite to habeas, for the only remedy that can be granted on

habeas is some form of discharge from custody. McNally v. Hill . . . ." Fay v. Noia, 372 U.S. 391, 427 n. 38. We find nothing in Fay to suggest that denial of eligibility for parole constitutes a restraint of liberty.

Jones and Fay are distinguishable from McNally, Martin, and this case, on the basis of prematurity, or mootness. Jones and Fay were single sentence cases in which habeas corpus could result in the petitioners' immediate release from custody. In the McNally-Martin situation, where the sentence attacked is to be served in the future, there is no prospect of immediate release. Nor is immediate release possible in appellant's case. If appellant prevails he will not be entitled to freedom, or even to parole as a matter of right; he will only become eligible for parole. Thus, as in McNally and Martin, appellant's attack is premature. The writ will not lie when the case has been mooted. Parker v. Ellis, 362 U.S. 574 (1960). In our view, prematurity and mootness are two sides of the same coin.

Moreover, it is doubtful that release on parole is within the scope of relief authorized by the writ, since Jones held that a prisoner on parole remains in custody. United States ex rel. Chilcote v. Maroney, 246 F.Supp. 607 (W. D. Pa. 1965). The writ lies to restore men to freedom, not to alter the circumstances of their custody.

Understandably, other courts have been more reluctant to overrule the Supreme Court that has the Fourth Circuit. The McNally doctrine stands in other circuits. See e.g., Palumbo v. State of New Jersey, 334 F.2d 524 (3d Cir. 1964); Osborne v. Taylor, 328 F.2d 131 (10th Cir. 1964); Carpenter v. Crouse, 358 F.2d 701 (10th Cir. 1966); King v. California, 356 F.2d 950 (9th Cir. 1966); but contra, Cuevas v. Wilson, 274 F.Supp. 65 (N. D. Cal. 1966); and cf. Allen v. United States, 349 F.2d 362 (1st Cir. 1965). Accord: United States ex rel. Brown v. Warden, 231 F.Supp. 179 (S. D. N.Y. 1964); United States ex rel. Chilcote v. Maroney, supra.

Perhaps these courts have been mindful of the necessary broad implications of Martin. The Fourth Circuit, however, appears willing to extend Martin to the limit of its logic: habeas corpus is available to attack any conviction. Williams v. Peyton, 372 F.2d 216 (4th Cir. 1967) held that the writ is available to one already eligible for parole on a sentence which he does not question, but whose chances for parole are manifestly restricted by the fact of other convictions and unserved sentences thereon, alleged invalid.[2/] In Tucker v.

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2. It seems doubtful that parole boards will be moved to parole an inmate, like appellant, who might show that one of his convictions, although founded upon guilt, was constitutionally infirm.

Peyton, 357 F.2d 115 (4th Cir. 1966), the court raised but left unanswered the question of whether a state prisoner is entitled to habeas corpus "though nominally held under an invalid sentence if there is a valid sentence to be served consecutively, until he has remained in custody long enough to meet the service requirements of the valid sentence." Id. at 117-18. We may expect the Fourth Circuit to provide the answer at an early date.

Given the inexorable logic of Martin, the Fourth Circuit must finally conclude that a state prisoner is entitled to attack any conviction. Having thus repealed the "in custody" requirement of 28 U.S.C. §2241, the court will then be forced to excise the identical language from 28 U.S.C. §2255, discarding several additional decisions by the United States Supreme Court in the process.

Appellant suggests that in Arketa v. Wilson, 373 F.2d 582 (9th Cir. 1967), this court accepted the rationale and holding Martin. He is mistaken.

Arketa suffered a criminal conviction in 1964. Prior convictions in 1957 and in 1961 left him ineligible for probation. Arketa was allowed to attack his 1961 conviction, under which he was serving a concurrent sentence, because if it were voided, he would become eligible for probation on the 1963 offense.

Probation, particularly in the absence of restrictive conditions, is tantamount to freedom. But for the alleged invalid conviction, Arketa might have been permitted to remain at liberty in 1964. Thus, Arketa holds only that the writ is available where the effect of the conviction attacked is to deprive the prisoner of the immediate possibility of freedom.

Appellant, like Martin, sought the writ not to gain the immediate possibility of freedom, but the future possibility of parole. Jones has established that parole is custody, not freedom.

Arketa permitted the use of the writ by a prisoner seeking probation. In language unnecessary to that decision, this court repeated an earlier dictum[3/] suggesting that the restrictions incident to probation matched those incident to parole, and hence, both probation and parole constituted "custody." If this assumption were fact, there would appear as much reason to allow a prisoner to change his status from prisoner to parolee as from prisoner to probationer.

We submit, however, that parole and probation greatly differ both in concept and in practice. Parole is

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3. Benson v. California, 328 F.2d 159 (9th Cir. 1964)

but an extension of the prison walls. The parolee remains a constructive prisoner. He does not enjoy in full measure the right of privacy protected by the Fourth Amendment. His parole officer may search his home without a warrant. See Hoptowit v. United States, 274 F.2d 936 (9th Cir. 1960). In California, a parolee has only those limited civil rights restored to him by the Adult Authority. Penal Code §3054. Examples of the restrictive social and economic conditions characterizing parole are found in Jones v. Cunningham.

Probation imposes fewer special restrictions upon personal liberty. A probationer does not necessarily forfeit his civil rights. His home is not subject to warrantless searches. In California, a successful probationer may retroactively withdraw his guilty plea or have an adverse verdict set aside in order to permit the court to dismiss the indictment or information lodged against him. Pen. Code §1203.4. This provision reflects the fundamental difference in the philosophies underlying probation and parole.

Sitting en banc, this court in Strand v. Schmittroth, 251 F.2d 590 (9th Cir.), cert. denied, 355 U.S. 886, 78 S.Ct. 258, 2 L.Ed.2d 186 (1957), carefully distinguished probation from physical custody. To equate them was said to be "flagrant error." Id. at 602. Parole has now been equated with physical custody. Jones

v. Cunningham. However, to equate parole with probation is still "flagrant error."

Because probation does not constitute a restraint on liberty as does parole, Arketa is not authority for issuance of the writ in the instant case. Additionally, there remains the consideration of prematurity. Arketa claimed an immediate possibility of probation; appellant claims only the future possibility of parole. . Arketa is thus reconciled with McNally, and distinguished from appellant's case.

This view gains assurance from this court's decision in Barquera v. California, 374 F.2d 177 (9th Cir. 1967). Barquera was convicted for sale of heroin on July 10, 1961, and sentenced to be imprisoned for five years to life. The next day he was convicted for possession of narcotics and sentenced to imprisonment for two to twenty years. Barquera petitioned for habeas corpus. This court held that, because Barquera could not overcome his first conviction, it was unnecessary to consider his attack on the subsequent conviction.

Had this court adopted the view of the Fourth Circuit, it would have reviewed Barquera's contentions as to his second conviction on the basis that it might affect his chances for parole under the prior valid judgment. See Williams v. Peyton, supra.

Appellant urges more than an erosion of the

McNally doctrine. He asks this Court to overrule the Supreme Court by declaring that McNally no longer is the law of the land. We have shown that existing authorities neither require nor permit this. Moreover, the policies underlying application of the McNally doctrine to cases involving state prisoners still warrant service. Federal courts traditionally have refused to tax the delicate federal-state relationship by overturning a state court judgment, upheld by state reviewing courts, in order to render an opinion which may be advisory. There is no reason to alter this stance.

The McNally doctrine promotes the policy of finality of judgments. Finality is not achieved at the cost of freedom, however, for collateral attacks on judgments may be made in state courts.

The number of petitions for habeas corpus ever increases. The vast majority of petitions advance frivolous claims. McNally screens out petitions asserting claims which are almost certainly frivolous and which may never need to be heard.

The scope of the Great Writ is a matter which the Supreme Court has reserved to itself. McNally, supra, at 136, 55 S.Ct. at 26, 79 L.Ed. at 241. We submit that the circuit courts should accord the high court complete deference on this question.

To abrogate the statutory requirement of custody

as a condition for the availability of the writ by redefining the concept of "restraint of liberty," as the Fourth Circuit has done, is to intrude upon a sensitive area: the power of the Supreme Court to adjudicate only actual cases and controversies. U.S. Const. art. III, §2.

It is doubtful whether an attack upon a conviction which is not now, and may never be, the basis for detention, presents a case or controversy in the constitutional sense. Resolution of this question lies within the peculiar competence of the Supreme Court. Surely, at some point, the statutory rule requiring that a petitioner be "in custody," merges with the constitutional rule limiting the adjudicatory power of the high court to actual cases or controversies. The Supreme Court must be permitted to determine where that intersection occurs.

CONCLUSION

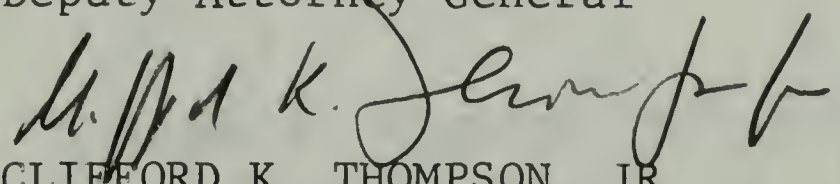
Appellant, in applying for a Certificate of Probable Cause, confined himself to the District Court's application of the McNally doctrine (TR 209). The Certificate of Probable Cause issued, expressly limited to this, the sole question resolved by the District Court (RT 216). If appellant prevails on the procedural point, his contentions on the merits first must be made before the District Court, not before this appellate court. Accordingly, we respond only to appellant's argument on the procedural issue.

For the reasons stated, it is respectfully submitted that the order of the District Court denying appellant's petition for the writ of habeas corpus must be affirmed.

DATED: October 9, 1967

THOMAS C. LYNCH, Attorney General
of California

DERALD E. GRANBERG
Deputy Attorney General



CLIFFORD K. THOMPSON, JR.
Deputy Attorney General

Attorneys for Appellees

CKT/gb
CR-SF
65-2294

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 +39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DATED: October 9, 1967

CLIFFORD K. THOMPSON, JR.
Deputy Attorney General
of the State of California

D. Ward

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

MINUTES

December 11, 1958 Present Hon. MAURICE C SPARLING Judge

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

ROBERTO VARGAS GARCIA Defendant,

Department No. 41

208242

Deputy District Attorney Kenneth J Thomas and the Defendant with counsel, Deputy Public Defender Walter Slosson, present. Defendant's motion to set aside his plea is denied. The prior conviction is found true. Probation denied. The defendant is sentenced as indicated.

Whereas the said defendant having duly pleaded guilty in this court of the crime of VIOLATION OF SECTION 11500, Health and Safety Code of the State of California, (Possession), a felony, as charged in the information; prior conviction proven true as alleged, to wit: Violation of Section 11500, Health and Safety Code, a felony, Superior Court of the State of California, Los Angeles County, August 26, 1954

C. I. M.
1958 DEC 26 PM 2:08
G.C.ADMITTANCE

It is Therefore Ordered, Adjudged and Decreed that the said defendant be punished by imprisonment in the California ~~State Prison for the term prescribed by law~~ State Prison for the term prescribed by law.

It is further ordered that the defendant be remanded into the custody of the Sheriff of the County of Los Angeles, to be by him delivered into the custody of the Director of Corrections at the California ~~State Prison at Chino~~ State Prison at Chino.

W C Kelley

Prob. ..... Par. .....
LAP. ..... CYA. .....
CO. J. ..... C. C. .....
Shor. ..... Pris. ..... Misc. .....

This Minute Order has been entered on DEC 16 '58
HAROLD J. OSTLY, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles.

By ..... Deputy

MINUTES — State Prison
~~(WOMEN)~~ (MEN)

EXHIBIT A

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

JUDGMENT

Department No. 118

January 30, 1963 19__ Present Hon. JOHN G BARNES Judge

THE PEOPLE OF THE STATE OF CALIFORNIA, vs

ROBERTO VARGAS GARCIA 265838

Cause is called for trial. Deputy District Attorney B Denmark and the Defendant with counsel A Matthews and F Cooper, present. Defendant and all counsel waive trial by jury. Pursuant to stipulation it is ordered that it be deemed that William King, a chemist, has been called, sworn and testified in accordance with record of official reporter. Howard C Evans is sworn and testifies for the People. People's Exhibits 1 (envelope and contents), 2 (key), 3 (letter), 4 (receipt), 5 (certified copies of records of the Department of Corrections) and 6 (certified copies of records of the California Youth Authority) are admitted in evidence. Defendant's motion to suppress evidence is overruled. People and Defendant rest. Defendant makes closing statement to the Court. The priors charged are found to be true and Defendant is found to be "Guilty" as charged. Defendant refuses to fil application for probation and request immediate sentence. Sentenced as indicated.

Whereas the said defendant having been duly found guilty in this court of the crime of VIOLATION OF SECTION 11500, Health and Safety Code, a felony, as charged in the information; prior convictions having been found true as alleged, to wit: Violation of Section 11500, Health and Safety Code, a felony, Superior Court of the State of California, Los Angeles County, August 26, 1954 and Violation of Section 11500, Health and Safety Code, a felony, Superior Court of the State of California, Los Angeles County, December 11, 1958 and served a term in the State Prison

It is Therefore Ordered, Adjudged and Decreed that the said defendant be punished by imprisonment in the State Prison for the term prescribed by law.

It is further Ordered that the defendant be remanded into the custody of the Sheriff of the County of Los Angeles, to be by him delivered into the custody of the Director of Corrections at the California State Prison at Chino.

This minute order was entered
FEB 4 1963 C. A. Rhetta
WILLIAM G. SHARP, COUNTY CLERK and Clerk of the Superior Court BY C. A. RHETTA, DEPUTY

Prob. / Aud. DMV
LAPD / Cshr. CYA
CO. J. / Juv. C. Clk.
Sher. / Psyc. Misc.

This Minute Order has been entered on .....
WILLIAM G. SHARP, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles.

By ..... Deputy

This is to certify that the foregoing is a true and correct copy of the original on file in my office.
Dated:
WILLIAM G. SHARP, County Clerk By ..... Deputy

JUDGMENT — State Prison
(Men)

1639TB—7/61

EXHIBIT B